IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Second Appeal No.1143 of 2004

Shri Prakash Narayan Rudrakar — Appellant
Vs.
Nivrutti Raghoba Kale, since deceased
by his LRs and ors. — Respondents

Mr.A.A.Garge for appellant.
Mr.S.A.Sawant for respondent nos.1(a) to 1(g).

CORAM: B.H.MARLAPALLE, J.

April 17, 2007.

P.C.

. Heard Mr.Garge, the learned counsel for the original decree holder in RCS No.2403 of 1981.

. Admit. Mr.Sawant waives service for the respondent nos. 1(a) to 1(g). As noted in the order dated 4/10/2004 the appeal is taken up for final hearing forthwith.

. There is no dispute that the decree passed in RCS No. 2403 of 1981 was confirmed by this Court in Writ Petition Nos.2416 of 1985 and 4164 of 1985 decided on 28/1/1998 and the SLPs filed by the judgment debtor as well as the tenants came to be dismissed. Regular Darkhast No. 165 of 2003 was thereafter instituted for execution of the decree confirmed right upto the Supreme Court.

. In the said execution proceedings the present respondent no.1 - original defendant no.4 represented through his LRs - respondent nos. 1(a) to 1(g) filed an application at Exhibit 27 purportedly under Order XXI Rule 9 of CPC and the same came to be rejected by the executing Court on 21/1/2004. This order passed by the executing Court was challenged in Civil Appeal No.121 of 2004 and the learned 15th Ad-hoc Addl. District Judge at Pune by his judgment and order dated 19/4/2004 was pleased to allow the appeal. The order dated 21/1/2004 in Darkhast No.165 of 2003 was set aside and the trial Court was directed not to proceed further with the execution proceedings of the decree passed in Civil Appal No.484 of 1984 i.e. RCS No. 2403 of 1981.

. It was necessary for the lower appellate Court first to consider whether the application at Exhibit 27 filed by the respondent nos. 1(a) to 1(g) is maintainable and unless the said application was maintainable, provisions of Rule 103 could not be relied upon to file the appeal. Mr.Garge referred to Section 47 of CPC and submitted that if at all the respondent nos.1(a) to 1(g) wanted to obstruct the

decree or wanted that some other questions were required to be determined by the executing Court, the remedy to file an application under Section 47 was available to the said defendants. However, these are the issues which are required to be framed and decided by the lower Appellate Court and it is evident that they have not been addressed to by the said Court. This appeal, therefore, partly succeeds only on this limited issue and it is not necessary to go into the merits of the impugned decree passed by the lower Appellate Court.

. Hence the Second Appeal is allowed and the impugned judgment and order dated 19/4/2004 passed by the 15th Ad-hoc Addl. District Judge at Pune is hereby quashed and set aside and Civil Appeal No.121 of 2004 is hereby restored to the file of the said Court for fresh decision on all the points including the point of maintainability of the said Appeal. On remand Civil Appeal No.121 of 2004 shall be heard and decided on its own merits as expeditiously as possible and preferably within a period of six months from the date the parties appear before the lower Appellate Court. The parties to appear before the lower Appellate Court on 3rd May 2007. Undoubtedly

on restoration of the appeal the protection, if any, granted to the appellant shall continue to operate till it is decided afresh.

(B.H.MARL